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No. 835

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

GREENWOOD WOOTEN, ET AL.,
Petitioners

vs.

THE STATE OF TEXAS,
Respondent

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS

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Attorneys for Petitioners

Baldwin Printing Company, Inc., 209 West Eighth Street, Austin

No. 830

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

GREENWOOD WOOTEN, ET AL.,
Petitioners

vs.

THE STATE OF TEXAS,
Respondent

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS

Petitioners pray that this Court grant a rehearing of its order of May 21, 1962 and that a writ of certiorari issue to review the judgment of the Court of Civil Appeals for the Third Supreme Judicial District of Texas, and alternatively the judgment of the Supreme Court of Texas denying application for writ of error.

Reasons for Granting Rehearing and Issuing the Writ

1. At the time of mailing the petition for certiorari to the Clerk on March 30, 1962, counsel for petitioner had not received a copy of this Court's opinion in *Griggs v. Allegheny County*, being Cause No. 81 decided March 5, 1962. Such opinion was published March 26, 1962 in Advance Sheet No. 8, 7 L ed (2) page 585. Such opinion holds that airplane flights above real estate, indirectly impairing the use of lands below, amount to a "taking" in the Constitutional sense.

The Opinion in the *Griggs* case states that: "the use of land presupposes the use of some of the airspace above it." (7 L ed (2) 588. While this statement was based on the holding in *United States v. Causby*, 328 U. S. 256, 90 L ed 1206, 66 S. Ct. 1062, it is important to note that in the *Causby* case the facts showed that the air invasion had made the land *unusable*, whereas in the *Griggs* case the invasion only made the land undesirable for residential use, although unbearable to some.

In the case below, the facts are that the property was practically destroyed. The opinion of the court of Civil Appeals that the furniture was not "taken" simply ignores the real facts.

Use of furniture presupposes the use of lands and improvements to which it is adapted. When the lands are taken away and also the buildings thereon, the furniture loses most of its utility. The fact of such damages is undisputed on this appeal.

Texas recognizes that depreciation in market value is not a proper test for determining just compensation because of injury to furniture. A man's furniture in his home has little, if any, *market* value. It is the value to *him* which is impaired by injury. Accordingly, Texas recognizes that the value to *him*, not market value, is the test. *Watke v. Yolton*, 71 S. W. (2) 549; *Ricks v. Smith*, 204 S. W. (2) 12.

Impairment of use of lands and improvements caused by the noise of aircraft, is just as indirect an injury to such property as is impairment of use of furniture caused by the condemnation of the buildings in which such furniture is situated and for which it was designed to serve. In any event, direct causation was established below as reflected in the Bill of Exceptions.

2. The question continues to be of importance to the Nation. Denial of compensation tends to impress all minds with the view that the courts, in their zeal to thwart speculative recoveries, have become too conservative. "Just" compensation is the language of the Constitution. For the word, "just," the courts have substituted that indefinite and ambiguous standard, "market value," where that standard can be used at all. In addition, the courts have said that speculative, remote, and consequential damages will not be allowed. The tendency has been to pare down, rather than to add to; we contend that the time has come for the courts to expressly recognize that in condemnation cases extreme care should be exercised in the other direction—to see to it that the homeowner, who is in court not by his own choice, is given *just* compensation.

Conclusion

For the reasons set forth above, and in the petition for writ of certiorari it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue.

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CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

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Counsel for Petitioner.

I hereby certify that I served the within petition on Robert Burns, South Coast Building, Houston 2, Texas, who is attorney for the State of Texas, Respondent, by depositing in the United States Mail this the 12th day of June, 1962, proper postage prepaid.

Coleman Gay